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Via E-Mail & U.S. Mail

Michael Massey, Esq.
Office of Regional Counsel
U.S. Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, CA 94105

Re: Yosemite Slough Site, San Francisco, CA

Dear Mr. Massey:

I write to follow up on our telephone conversations on April 28, 2009. As discussed in more detail below, the Yosemite Slough PRP Group (the "Group") is surprised and disappointed to learn that the United States Environmental Protection Agency ("EPA") will not be preparing a final Sediment Sampling and Analysis Plan at Yosemite Slough (the "Slough" or the "Site") as previously indicated. Instead, EPA apparently will implement its draft work plan without addressing the significant concerns about its adequacy that have been raised by the Group and the City and County of San Francisco (the "City"). In addition, EPA has rejected the Group's reasonable requests for transparency regarding this sediment sampling. With this letter, I reiterate the Group's requests for more information about what sort of lab analyses will be performed on the samples collected, notice of the actual sampling at the Site, the opportunity to observe the sediment sampling, and the opportunity to collect split samples. As we've discussed, the Group would take every precaution to ensure that we do not interfere with the field work. Thus, the accommodation of the Group's requests would not delay or add costs to the field work, and would enhance the value of the data collected.

In January, EPA provided to the Group and the other cooperating PRPs – the City and the California Department of Parks and Recreation ("DPR") – a ***draft*** work plan entitled *Sampling and Analysis Plan, Yosemite Creek Sediment Removal Assessment*, January 16, 2009, prepared by Ecology and Environment, Inc. ("EPA's Draft SAP") and invited comments. The Group and its consultants, as well as the City, DPR, and DPR's partner the California State Parks Foundation and its consultants, all then met with EPA on January 23 to discuss EPA's Draft SAP. Following the meeting we provided a detailed memorandum regarding recommended

revisions to the work plan based primarily on EPA's guidance documents. (A copy is attached as Exhibit A.) The City also provided comments (see Exhibit B hereto.)

Our January 23 meeting was followed by several months of discussions regarding the possibility of the Group performing investigative work at the Site. Throughout these discussions you repeatedly reaffirmed EPA's intention to prepare a revised work plan. Indeed, near the end you told me that if the Group wanted to do the work, it must agree to do it strictly in accordance with the revised work plan that would incorporate only some of the Group's comments on EPA's Draft SAP. The Group would be required commit to performing the revised work plan as a condition of being permitted to implement it, even though we would not be given a chance to review it beforehand.

On April 9, 2009, you again confirmed that a revised work plan would be prepared and that EPA likely would incorporate some of the Group's comments. However, on April 28, you abruptly informed me that EPA had changed course and would not prepare a revised work plan, but instead would perform the work pursuant to EPA's Draft SAP. You also told me that EPA would not officially incorporate any of the Group's comments.[1] When I then inquired about my standing request that EPA allow the Group to observe the sampling work, you stated "No, not granted. You have not done anything for us so why should we do anything for you?" This was surprising in light of our many months of good faith negotiations and the many constructive suggestions that were submitted in an effort to improve EPA's Draft SAP regardless of who implemented it. Your response was even more surprising given EPA's recent commitment to greater transparency and openness. (S*ee* April 23, 2009 memo "Transparency in EPA's Operations" from Lisa Jackson, EPA Administrator, *available at* http://www.eenews.net/public/25/10668/features/documents/2009/04/24/document_gw_01.pdf.)[2]

We are troubled by EPA's sudden change of course. Since receiving the General Notice of Potential Liability regarding Yosemite Slough, dated February 21, 2008 (the "GNL") and the unsigned and undated Action Memorandum regarding the Site (the "Unsigned Action Memo"), the Group has acted in good faith in negotiating with EPA. The Group's efforts have included:

- Organizing a PRP Group to facilitate negotiations with EPA, repeatedly updating EPA's chart of PRPs and bringing to the table more than half of the PRPs identified by EPA (15 active Group members and another 28 PRPs whose interests at the Site are being handled by a subset of the Group).

[1] While you stated that EPA will not "officially" incorporate any of the Group's comments, you indicated that the sediment sampling would be performed using a boat-mounted vibracore as we had recommended. This apparently is the only one of Cooperating PRPs' recommendations that will be incorporated into the sediment sampling work.

[2] EPA's lack of transparency also conflicts with the Administration's policy with respect to the Freedom of Information Act, as reflected in the March 19, 2009, memo from Attorney General Holder to all heads of executive departments and agencies. (*See* http://www.usdoj.gov/opa/pr/2009/March/09-ag-253.html.)

- Providing numerous substantive third-party technical documents regarding the Site, many of which EPA acknowledged it had not seen before (including when it had prepared the Unsigned Action Memo).

- Hiring investigators to review the historic industrial activities in the area surrounding the Slough to identify potentially significant and viable PRPs.

- Providing extensive information and legal analysis enabling EPA to name DPR and the City as PRPs and to issue additional 104(e) information requests to potential PRPs that operated industrial facilities in the drainage basin.

- Sending a letter to EPA in September 2008 committing to enter into negotiations for an administrative order on consent ("AOC"), including preliminary discussions regarding an AOC and the scope of work to be addressed in an AOC. Later we also provided extensive comments on EPA's draft AOC.

- Retaining Arcadis, a highly qualified environmental remediation consultant, to advise the Group regarding the Site, and with the assistance of Arcadis, providing additional technical information and analysis to assist EPA in its investigation and remediation of the Slough.

- Negotiating at length and at a substantial cost in the midst of the worst economic crisis since the Great Depression in a pragmatic effort to find a workable, cooperative approach.[3]

We frankly are surprised and disappointed that in spite of this level of engagement and cooperation, EPA has taken such a dramatic change in course. In effect, EPA has rejected any participation by the cooperating parties from which it has stated it intends to seek recovery of the bulk of the Site costs, while they have been trying in good faith to work with EPA. We therefore request that EPA reconsider the position taken during our telephone conversation. We now reiterate in writing our specific requests:

- First, we request the right to observe and monitor the work being performed under EPA's Draft SAP. This is warranted given that the EPA's stated intent is to seek cost recovery from the Group. Our participation would help EPA to ensure that no deviations from its guidance occur. (This has occurred at this site, as detailed in part below.)

[3] In addition to numerous telephone conversations, emails, and other written communications, these negotiations included in-person meetings between the Group and EPA on April 11, June 11 and October 27, 2008, and on January 23, 2009.

- Second, we request more information and a clear explanation regarding EPA's planned laboratory analysis of PCBs detected in the Slough sediment samples. As we detailed at page 6 of our memo commenting on EPA's Draft SAP (Exhibit A hereto), a meaningful analysis of PCBs requires complex laboratory analyses and the use of appropriate comparisons.

- Finally, we request that EPA make available to the Group split samples of all sediment samples collected by EPA or its consultants.

Since EPA has made clear that it considers the Group to bear the largest share of responsibility for cleanup at the Site, the Group is entitled to this information. It is also appropriate in view of EPA's new policies of transparency and openness.

It bears repeating that we are surprised and disappointed that EPA has decided not to revise EPA's Draft SAP and apparently has disregarded all but one of the Cooperating Parties' recommendations. As discussed in more detail below, EPA's Draft SAP is clearly inadequate. Moreover, EPA's approach to the Site and rationale for requesting a removal action at Yosemite Slough lack the requisite evidentiary support, and are arbitrary and capricious. Thus, EPA is not in compliance with Section 300.415 of the National Oil and Hazardous Substances Pollution Contingency Plan (the "NCP"), 40 CFR § 300.415. We request that EPA reconsider our requests above, and we hereby notify EPA that the Group will consider any cost claims invalid without this information.

A. EPA's Draft SAP does not Provide The Necessary Data Required For EPA's Proposed Removal Action.

The NCP provides that, "[t]he lead agency shall conduct an engineering evaluation/cost analysis (EE/CA) or its equivalent. The EE/CA is an analysis of removal alternatives for a site." 40 C.F.R. 300.415(b)(4)(i). The NCP further requires, "[i]f environmental samples are to be collected, the lead agency shall develop sampling and analysis plans that shall provide a process for obtaining data of sufficient quality and quantity to satisfy data needs." 40 C.F.R. 400.415(a)(4)(ii).

When EPA issued the GNL and Unsigned Action Memo, it was apparent that EPA had not reviewed many of the available technical reports regarding the Site. The Group provided these reports to EPA in June 2008. However, even after receiving these reports, EPA maintained that its selected remedy was appropriate and needed to be performed immediately as a time-critical removal action. EPA now plans on performing EPA's Draft SAP without incorporating the recommendations submitted by the Group and the City -- and then to prepare an EE/CA. However, the existing data and the data resulting from implementation of EPA's Draft SAP will not provide adequate information to support EPA's currently proposed removal action, nor will it provide the necessary data to identify and evaluate alternatives as required by the NCP.

EPA's Draft SAP strays from EPA's own guidance documents. Most importantly, EPA's Draft SAP does not follow the *EPA Sediment Remediation Guidance*. The Group's comments regarding EPA's Draft SAP were detailed in the January 30 memorandum (Exhibit A hereto), so I will not repeat them in their entirety here. However, I summarize the Group's key comments here, with our strong recommendation that EPA's Draft SAP be revised to:

- gather geotechnical data that will be necessary to evaluate remedial options and perform any eventual remedy;
- develop an adequate site conceptual model that includes the identification of all ongoing sources of contaminants, transport pathways, exposure pathways and receptors;
- gather data to perform an adequate risk assessment; and
- evaluate sources discharging into the Site and evaluate sedimentation, including basic engineering information such as topography, bathymetry, sediment thickness and grain size distribution.

During our conversation on April 28, you recognized that geotechnical data needed to be collected but said it would not be performed in conjunction with EPA's Draft SAP. You added that EPA was concerned only with the "what" at this stage and not the "how." If that is so, then clearly another round of site investigation will be necessary before EPA can adequately develop and evaluate removal alternatives as the EE/CA process requires. You also mentioned that EPA was working with the City and ***may*** take samples in sewer lines and outfall boxes at a later time. Whether EPA will gather adequate geotechnical data or investigate and evaluate source control remains to be seen. What is clear today is that it will be very inefficient – and may even jeopardize the validity of any conclusions drawn - for these necessary data collection and site characterization tasks to take place at different times.

If EPA does not gather geotechnical data for evaluating remedial options, EPA will lack the data necessary to perform a genuine analysis of removal options in the EE/CA as required by the NCP. Instead, it appears that EPA likely will follow its original remedy described in the Unsigned Action Memo -- *i.e.* essentially excavating from the surface down to a depth of three feet below the existing surface of the sediment and backfilling the slough with clean bay mud. *See* Unsigned Action Memo at 10-11.

Adequate evaluation of source control is critical at this Site. Otherwise, the risk of recontamination of Yosemite Slough after any eventual cleanup could be very high. Moreover, the pursuit of other PRPs could be difficult. We are concerned that EPA's continued lack of genuine pursuit of other PRPs at the Site, which has been evident since EPA first issued the GNL, will undermine the efforts to have the PRPs take financial responsibility at the Site.

Finally, since EPA has not developed an adequate site conceptual model and has not performed a complete risk assessment, EPA will lack the data for a complete assessment of the Site (and it would be extremely inefficient to perform this work at another time).

If EPA institutes a cost recovery action or issues a Unilateral Administrative Order at a later date, the Group will oppose any reimbursement for work performed pursuant to EPA's Draft SAP to the extent such work does not comply with the NCP and does not take into account the reasonable recommendations of the Group.[4] Because EPA has largely disregarded the available data and EPA's Draft SAP fails to provide for the collection of the necessary data, it is likely that the EE/CA and any final recommended remedy will be arbitrary and capricious, and will fail to comply with the NCP. Moreover, as discussed below, EPA's rationale for requesting any removal action at Yosemite Slough presently lacks evidentiary support.

B. EPA's Rationale for Requesting a Removal Action at Yosemite Slough Lacks Evidentiary Support.

At Yosemite Slough, EPA has concluded that "[g]iven the Site conditions, the nature or the hazardous substances documented on Site, and the potential exposure pathways to nearby populations . . . actual or threatened releases of hazardous substances from the Site, if not addressed by implementing the response actions selected in this Action Memorandum, may present an imminent and substantial endangerment to public health, or welfare, or the environment." Unsigned Action Memo at 18. EPA initially characterized the removal action as "time-critical," *see* Unsigned Action Memo at 1, which, among other things, is a removal action where less than six months exists before on-site removal activity must begin. *See* 40 C.F.R. §300.415(n)(2). EPA appears to have recognized that its initial characterization of the Site was incorrect, and has now indicated that it will re-characterize the removal action as "non-time-critical." However, EPA lacks the evidence to support its request for *any* removal action at Yosemite Slough.

Removal actions are governed by criteria established in the NCP, 40 C.F.R. Part 300, and several guidance documents issued by EPA. In order for a lead agency to make a determination that a removal action is warranted, the lead agency must first make a determination that there is a release or threat of a release into the environment of a hazardous substance, or a release or threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare. *See* 42 U.S.C. 9604(a)(1). When determining whether site conditions require EPA to utilize its removal authority, EPA is also guided by the recognition in the NCP and case law that removal actions are appropriate when

[4] The Group also plans on participating during the public comment period regarding the preparation of the EE/CA pursuant to the NCP, 40 C.F.R. 300.415(n)(4).

there is a need for a prompt response to a near-term threat.[5] Several courts have emphasized the importance of the "immediacy" of the threat.[6] In the words of the U.S. Court of Appeals for the Ninth Circuit, "[t]he informal interpretations [in EPA guidance] combined with the descriptions in the [NCP] provide a persuasive interpretation that removal actions encompass interim, partial time-sensitive responses taken to counter serious threats to public health."[7]

Section 300.415(b) of the NCP, 40 C.F.R. § 300.415(b), requires EPA to determine that a "threat to public health or welfare of the United States or the environment" exists before it can order a removal action. It establishes eight factors that EPA must consider in determining whether a removal action is necessary. The Unsigned Action Memo cites five of the eight factors set forth in the NCP as rationale for requesting a removal action at Yosemite Slough:

1. Actual or potential exposure to nearby human populations, animals, or the food chain from hazardous substances or pollutants or contaminants;
2. High levels of hazardous substances or pollutants or contaminants in soils largely at or near the surface, that may migrate;
3. Weather conditions that may cause hazardous substances or pollutants or contaminants to migrate or be released;
4. The availability of other appropriate federal or state response mechanisms to respond to the release; and
5. Actual or potential contamination of drinking water supplies or sensitive ecosystems.

See Unsigned Action Memo at 8-10.

EPA lacks evidence to support its conclusions regarding these five factors and available technical reports and studies contradict EPA's rationale for ordering a removal action at Yosemite Slough. Although EPA failed to review much of the data regarding the Site before it issued the GNL and Unsigned Action Memo, the Group provided many technical reports regarding the Site to the EPA in June 2008.[8] These reports contradict EPA's rationale for ordering a time-critical removal action. As discussed below, EPA's rationale for ordering this removal action lacks evidentiary support and is contradicted by the available evidence.

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[5] *See, e.g.*, 40 C.F.R. § 300.415(a)(2); *see also, California v. Hyampom Lumber Co.*, 903 F. Supp. 1389, 1391 (E.D. Cal. 1995) (citing *Exxon Corp. v. Hunt*, 475 U.S. 355, 360 (1986)); *Union Carbide Corp. v. Thikol Corp.*, 890 F.Supp. 1035, 1041 (S.D. Ga. 1994).

[6] *See, e.g., Carson Harbor Vill., Ltd. v. Unocal Corp.*, 287 F.Supp.2d 1118, 1157 (C.D. Cal. 2003) (stating "[t]here is no evidence in the record that the materials posed the type of threat to human health and welfare that required immediate action" and holding that cleanup was a remedial action); *City of Wichita v. Trs. of APCO Oil Corp. Liquidating Trust*, 306 F.Supp.2d 1040, 1077-78 (D. Kan. 2003) (holding that a lack of evidence of a threat which required immediate action indicates a cleanup that is "remedial in nature").

[7] *United States v. Grace*, 429 F.2d 1124, 1245 (9th Cir. 2005).

[8] An index of the technical reports the Group provided to EPA in June 2008 is attached as Exhibit C.

1. There is a Lack of Evidence of Actual or Potential Exposure to Hazardous Substances or Pollutants or Contaminants by Nearby Populations or the Food Chain.

According to EPA, the Little (1999)[9] and Battelle (2004) studies demonstrate the presence of zinc, lead, mercury, DDT, Dieldrin, Chlordane and PCBs in sediments at the Site at levels above the ERMs, and that PCBs, DDT, Dieldrin, and Chlordane are known to bioaccumulate in the biota. *See* Unsigned Action Memo at 8. EPA claims that the studies also demonstrated that tissue results from bentnose clams exposed for 28 days to surface sediments from the Site were elevated in PCBs, DDT, Dieldrin, and Chlordane compared to tissues of the same clams grown in non-contaminated reference area sediments in other areas of San Francisco Bay. EPA concluded that the presence of these hazardous substances in the bentnose clam studies demonstrated the threat of exposure to human populations and the food chain from contaminants at the Site. *Id*. at 9.

While hazardous substances in organisms in the environment can potentially demonstrate a threat of exposure to human populations and the food chain, this does not appear to be the case with bentnose clams at Yosemite Slough. According to Battelle (2004), although PCBs and chlorinated pesticides (DDT, Dieldrin, and Chlordane) were statistically elevated in tissues exposed to creek sediments compared to tissues exposed to in-bay reference sediments, "biota-sediment accumulation factors were significantly less than unity (one) for all samples (except Dieldrin 1.12 at Station 1S), *indicating that these chemicals may not biomagnify through the local food web*." Battelle (2004) at 6-8 (emphasis added).

EPA also states that in 1994, the California Office of Environmental Health Hazard Assessment ("OEHHA") issued a fish consumption advisory for the overall San Francisco Bay due to elevated levels of PCBs, mercury and other chemicals in popular sport fish at concentrations that posed potential human health risks. *See* Unsigned Action Memo at 9. Based on the results of recurrent monitoring, this fish consumption advisory remains in place. *Id.* EPA has cited no evidence that bentnose clams or any other organisms at Yosemite Slough host chemicals from sources other than the overall sources covered by the OEHHA advisory applicable to the entire San Francisco Bay. No evidence suggests that cleaning-up contaminants in the Slough will render resident bentnose clams safe for human consumption. Moreover, the fish consumption advisory cited by EPA mitigates against consumption of any fish caught at Yosemite Slough. As EPA's guidance documents for sediment sites recognize, such fish consumption advisories are often part of sediment remedies. *See* "Contaminated Sediment

[9] The San Francisco Public Utilities Commission ("SFPUC") prepared two Yosemite Slough Sediment Studies which investigated sediment chemistry, the nature and extent of the contamination and biotic toxicology and bioaccumulation at the Site. *See* Unsigned Action Memo at 4. These studies were: (1) "Sediment Investigation at Yosemite Creek, Fall 1998" by Arthur D. Little dated May 1999 ("Little (1999)"); and (2) "Draft Sediment Investigation at Yosemite Creek" by Battelle, dated May 5, 2004 ("Battelle (2004)").

Remediation Guidance For Hazardous Waste Sites" (U.S. EPA, December 2005, OSWER 9355.0-85) at 3-23, 7-14.

2. EPA's Conclusion that Yosemite Slough Contains High Levels of Hazardous Substances or Pollutants or Contaminants in Soils at or Near the Surface that May Migrate is Contradicted by Technical Reports Regarding the Site.

According to EPA, "it is apparent that surface sediment contaminant concentrations are variable across the Site, which indicates that shallow sediment contaminants are highly mobile." *See* Unsigned Action Memo at 9. EPA claims that this may be due to the fact that these sediments are exposed at low tide, and as the tides come and go, the surface material, which can be disturbed by wind chop, may be mobilized into the thin water column at low tide. *Id.*

EPA did not cite any evidence for its conclusions regarding the mobility of shallow sediments. In fact, studies regarding the hydrodynamics of the Site indicate that EPA's conclusions are inaccurate. In 2005, Noble Consultants conducted a hydrodynamic modeling study for the Yosemite Canal Wetland Restoration Project (the "Hydrodynamic Study").[10] EPA acknowledged in June 2008 that it was not aware of and had not reviewed this study before issuing the GNL and Unsigned Action Memo. According to the Hydrodynamic Study, modeling results "indicate that the sediment bed in the South Basin and in Yosemite [Slough] appears to be relatively stable and undisturbed." Hydrodynamic Study at 5-4. The Hydrodynamic Study concluded that "tidal currents are not likely to induce significant re-suspension of local bed material in Yosemite [Slough] under the typical tidal flow conditions." *Id*. at 5-5.

These studies indicate that further study of sedimentation, topography and bathymetry of the Site should be conducted, and the Group so recommended. (See Exhibit A hereto.) However, EPA has disregarded this recommendation.

3. There is a Lack of Evidence that Weather Conditions May Cause Hazardous Substances to Migrate or be Released at the Site.

According to EPA, since the operation of the current combined sewer and stormwater outfall system began in 1990, the rate of wet weather discharges at the overflow weir (at the head of the Slough) has dropped from 46 per year to a long-term average of 1 per year. Unsigned Action Memo at 9. At high or moderate tides, the likelihood of erosion causing mobilization of contaminated sediments is small due to the layer of tidal water over the sediments. *Id.* However, at low tides, the sediments are exposed. *Id.* EPA claims that "[d]uring a large rain event . . .

[10] *See Hydrodynamic Modeling, Wave Analysis and Sedimentation Evaluation for the Yosemite Canal Wetland Restoration Project San Francisco, CA*, Prepared for: California State Parks Foundation (Noble Consultants, Inc., September 2005). (There were two versions of this Hydrodynamic Study. The version cited here was the version prepared for the California State Parks Foundation, and not the version published in the journal Coastal Engineering in 2006.)

concurrent with a low tide, the 900+ cubic feet per second combined-sewer discharge from the overflow weir has the potential to incise through the exposed three-foot deep layer of contaminated sediments and thereby to mobilize and distribute them further out into the Bay." *Id*. at 9-10.

Again, EPA has failed to cite any evidence for its conclusions and the available evidence indicates that EPA's conclusions are incorrect. According to EPA, there are no "hot spots" of contamination in Yosemite Slough. If a mechanism such as this erosion were a factor at Yosemite Slough, one would expect to find that the concentrations of contaminants are higher down-gradient from the overflow weir. However, the limited data available suggests just the opposite – that in fact the concentrations are highest *closest* to the head of the Slough. The available evidence also indicates that contaminants from Yosemite Slough are not migrating out of the creek to the South Basin. Studies comparing PCBs found in sediments in Yosemite Slough and PCBs found in sediments in the South Basin indicate that the PCBs came from different sources.[11]

As discussed above, the Group recommended that EPA's Draft SAP include further study of sedimentation, topography and bathymetry of the Site. The Group also recommended that EPA's Draft SAP include study of ongoing sources to sediment and transport pathways. This data would provide evidence regarding whether weather conditions could cause contaminants to migrate. However, EPA has disregarded these recommendations and EPA's Draft SAP does not include adequate sampling for this data.

4. EPA has Failed to Adequately Consider the Availability of Other Appropriate Federal or State Response Mechanisms to Address the Site.

When planning remediation work at the Site, EPA must consider both the immediate and long term plans for the Site. According to EPA, no other appropriate federal or state response mechanisms are available. *See* Unsigned Action Memo at 10. However, EPA has failed to adequately consider other potential environmental remediation activities in the area that could impact the Site. For example, EPA has not adequately considered how DPR's planned wetlands mitigation project in the Slough would impact any sediment remediation. In addition, the City is overseeing major development projects at Hunters Point Shipyard to the north and Candlestick Point to the south which will impact the Site; these plans include a new six-lane bridge being built over Yosemite Slough to connect the two. *See* Candlestick Point and Hunters Point Shipyard Phase II Transportation Plan (Updated Draft) (December 9, 2008)(available at http://oewd.org/media/docs/DRAFT%20Transportation%20Plan%20for%20Hunters%20Point%20Shipyard-Candelstick%20Point.pdf). Moreover, it also is unclear how remediation work planned by the United States Navy in the South Basin would impact the Site. EPA has not

[11] *See* Final Hunter's Point Shipyard Parcel F Validation Study Report, San Francisco Bay, California, (Battelle, May 2, 2005) at 4-59 to 4-61.

adequately considered how any of these projects could impact the proposed removal action at Yosemite Slough.

5. EPA's Conclusion that Actual or Potential Contamination of Drinking Water Supplies or Sensitive Ecosystems Exists at Yosemite Slough is Contradicted by the Available Evidence.

According to EPA, "[t]he mudflats at the Site are defined as feeding habitat for the western snowy plover, which is currently on the federal threatened species list." Unsigned Action Memo at 10. EPA also stated, "[t]he tidal salt marsh fringe of the Site is habitat for the California clapper rail and the salt marsh harvest mouse, both of which are currently on the federal endangered species list" and that contamination at the Site is sufficient to further impair the utility of the area as successful habitat. *Id*.

Again, EPA failed to cite any evidence to support these statements. According to reports and studies undertaken in connection with the Yosemite Slough Restoration Project (the "Park"), the evidence shows that the Site is not habitat to any threatened or endangered species.[12] A report by LSA Associates, Inc. documents a wildlife survey of the Yosemite Slough Watershed.[13] This wildlife survey did not report sightings of any of the threatened or endangered species for which EPA claims the Site is habitat. *Id*. at Table 2.

According to the Wetland Restoration and Management Plan prepared for the Park, although several special status plant and animal species have been documented to occur, or potentially occur, in the southern San Francisco and northern San Mateo counties, "[a] search of the California Department of Fish and Game Natural Diversity Data Base found no documented occurrences of special status species within the [Park] Project Area."[14] The Wetland Restoration Plan states that two special status species (the California brown pelican and double-crested cormorant) may occasionally forage within subtidal and intertidal areas of the Park Project Area, but also noted that "these two birds do not nest within or adjacent to Yosemite Slough" and that "[b]ased on existing habitat conditions, there is a low potential for occurrence on the site for other special status animals; however, due to isolation from other similar habitats and the proximity of human activity, these species probably do not occur at the site." *Id*. at 4-5.

Moreover, the California Regional Water Quality Control Board has determined that none of the water in the entire San Francisco Bay Lower sub-basin, which includes the Yosemite Slough Drainage Basin, is a potential or existing source of drinking water. *See* San Francisco

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[12] If EPA is correct regarding the Site being habitat to threatened and endangered species, this fact would raise a question as to whether EPA has considered the potential impact of the proposed removal action on these species.
[13] *See* Final Report Yosemite Slough Watershed Wildlife Survey, 2003-2004 (LSA, July 27, 2004) (available at http://www.goldengateaudubon.org/PDFs/Yosemite_survey03-04.pdf).
[14] *See* Wetland Restoration and Management Plan (WRA Environmental Consultants, January 2006) ("Wetland Restoration Plan") at 4.

Bay Basin Water Quality Control Plan (Basin Plan) (January 18, 2007) at Table 2-1 (available at http://www.swrcb.ca.gov/rwqcb2/water_issues/programs/basin_plan/docs/bp_ch2+tables.pdf). The creek itself is not a source, as it long ago was converted by the City into an underground sewer that discharges into the combined sewer outfall at the head of the Slough. And of course the Slough itself is within the inter-tidal zone of San Francisco Bay and thus is not a source of drinking water.

C. Conclusion.

EPA has failed to obtain the evidence necessary to support a removal action at Yosemite Slough, and EPA's Draft SAP does not provide the data needed to fill the glaring data gaps. Available evidence indicates that many of EPA's conclusions are incorrect, and EPA has failed to satisfy the requirement that removal actions occur only when there is a need for a prompt, short-term response to a near-term threat. In addition, EPA's Draft SAP will not adequately support an EE/CA that would address these shortcomings, and EPA has rejected the Group's efforts to ensure that the work be done in conformity with the *EPA Sediment Remediation Guidance*. EPA's entire approach to the Site has been and remains replete with NCP inconsistencies. Therefore, the Group reiterates its request that EPA's Draft SAP be revised to:

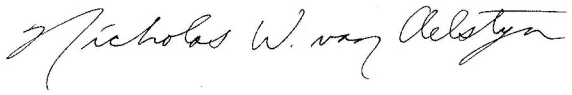
- gather technical data that will be necessary to evaluate remedial options and perform any eventual remedy;
- develop an adequate site conceptual model that includes the identification of all ongoing sources of contaminants, transport pathways, exposure pathways and receptors;
- gather data to perform an adequate risk assessment; and
- evaluate sources discharging into the Site and evaluate sedimentation, including basic engineering information such as topography, bathymetry, sediment thickness and grain size distribution.

The Group also reiterates its requests for transparency with respect to EPA's planned sediment sampling; we request:

- the right to observe and monitor the work performed under EPA's Draft SAP;
- information and a clear explanation regarding EPA's planned approach to the laboratory analysis of PCBs detected in the Slough sediment samples; and
- that EPA make available to the Group split samples of all sediment samples collected by EPA or its consultants.

Thank you for your consideration. We look forward to hearing from you soon.

Sincerely,



Nicholas W. van Aelstyn

Enclosures

cc: Marie Rongone, Esq. (w/ enclosures) (*via email*)
Elaine M. O'Neil, Esq. (w/ enclosures) (*via email*)
Kathryn Tobias, Esq. (w/ enclosures) (*via email*)